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No. 92-5653

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DORSIE LEE JOHNSON,

Petitioner,

vs.

THE STATE OF TEXAS,

Respondent.

On Writ of Certiorari to the Court of Criminal Appeals of Texas

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

KENT S. SCHEIDEGGER
Criminal Justice Legal Fdn.
2131 L Street (95816)
Post Office Box 1199
Sacramento, CA 95812
Telephone: (916) 446-0345

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

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QUESTIONS PRESENTED

1. Did *Jurek* v. *Texas* approve the Texas capital sentencing system of considering youth as mitigating only as it bears on future dangerousness?

2. If so, should *Jurek* be overruled?

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MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF RESPONDENT

Pursuant to Supreme Court Rule 37.3, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of respondent in the above captioned case. Counsel for respondent has consented, but counsel for petitioner has refused consent.

In the accompanying brief, *amicus* argues that *Jurek* v. *Texas* is dispositive of this case unless overruled, and that *Jurek* ought not be overruled.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid, efficient and

reliable determination of guilt and swift execution of punishment.

Capital punishment has three functions: incapacitation, deterrence, and retribution. It cannot perform these functions if this Court constantly changes the rules, striking down systems it has previously upheld. Such undermining of the interests of victims of crime is contrary to the rights CJLF was formed to protect.

For the foregoing reasons, *amicus curiae* requests leave to file its brief.

April, 1993

Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

SUMMARY OF FACTS AND CASE

On March 23, 1986, defendant petitioner Dorsie Johnson and his accomplice Amanda Miles decided to rob Allsup's convenience store in Snyder, Texas. They decided in advance that they would murder any witnesses. Johnson ordered the clerk, Jack Huddleston, to lie on the floor. Johnson then shot Huddleston in the back of the neck, killing him. The robbery netted $160 and two cartons of cigarettes. *Johnson* v. *State*, 773 S. W. 2d 322, 324 (Tex. Crim. App. 1989).

Johnson subsequently robbed another store. Johnson shot the store owner in the face, and his accomplice stabbed the owner in the back. Fortunately, they did not succeed in killing him. Pet. Brief 6-7. Following his arrest for the second robbery and attempted murder, Johnson confessed to the murder of Jack Huddleston. 773 S. W. 2d, at 324.

In the penalty phase, the principal defense witness was defendant's father, Dorsie Johnson, Sr. Mr. Johnson emphasized his son's youth, 19 at the time of the crime, and involvement with drugs. He tied his testimony directly to the question of future dangerousness, emphasizing his son's potential for rehabilitation. Pet. Brief 7-8.

The trial judge instructed the jury on the Texas "special issues," which ask the jury about the deliberateness of the crime and the probability that the defendant would be dangerous in the future. The judge also modified the statutory instructions to explicitly tell the jury to consider mitigating evidence in determining the special issues. However, the court refused to instruct the jury to consider mitigating evidence outside the framework of the special issues. The jury answered the questions "yes," and Johnson was accordingly sentenced to death. Pet. Brief 10; App. Pet. Cert. B-1.

The Texas Court of Criminal Appeals affirmed on June 21, 1989. 773 S. W. 2d, at 322. Five days later, this Court decided *Penry* v. *Lynaugh*, 492 U. S. 302 (1989). Johnson petitioned for rehearing based on *Penry*, contending insufficient consideration of his youth as a mitigating factor. The state court denied rehearing in an unpublished opinion. It held that the instructions in the case permitted the jury "to express a reasoned moral response to applicant's youth." App. Pet. Cert. B-3.

Johnson filed a petition for writ of certiorari in this Court. The only question relating to the instruction of the jury was this: "Did the Texas capital sentencing statute unconstitutionally preclude the jury from giving full mitigating effect to the petitioner's youthful age at the time of the offense?" Pet. Cert. i. The Court granted certiorari limited to this question on February 19, 1993.[1]

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1. Defendant now appears to regret his own decision to limit consideration to the question of age. See Pet. Brief 26, n. 14.

SUMMARY OF ARGUMENT

Jurek v. *Texas* controls this case. *Jurek* considered the constitutionality of the Texas system as applied to the facts in that case and found that the special issues provided constitutionally sufficient consideration of Jurek's mitigating evidence. The cases are factually indistinguishable.

Jurek has not been overruled to date. *Penry* v. *Lynaugh* created an exception for cases where important mitigating evidence cannot be given *any* mitigating force under the Texas special issues. While *Penry* might, on its face, be read more broadly, any such interpretation is precluded by *Saffle* v. *Parks* and *Graham* v. *Collins*.

For the reasons stated in *Planned Parenthood* v. *Casey*, *Jurek* should not be overruled now. The *Jurek* rule is not unworkable. Texas has a massive reliance interest in preserving judgments tried according to this Court's determination of constitutionality. *Jurek* is not a remnant of abandoned doctrine, and there are no changed facts justifying its repudiation.

Capital punishment is an issue of great national controversy. The people of America have already been badly whipsawed on this issue. To strike down a sentencing system previously approved would do grave damage to this Court as an institution and to the people's faith in the rule of law.

ARGUMENT

Petitioner Johnson contends that the Texas death penalty statute upheld in *Jurek* v. *Texas*, 428 U. S. 262 (1976) is unconstitutional as applied to him. The reason, he claims, is that even though the jury could have considered his youth in answering the "dangerousness" question, the jury was not permitted to consider whatever mitigating force his youth had beyond the scope of that question.

Given that *Jurek* upheld the sentencing system used in this case, Johnson's claim raises three questions. Can his position be reconciled with *Jurek*? If not, has *Jurek* already been overruled *sub silento*? If not, should *Jurek* be overruled in this case? The answer to all three, *amicus* submits, is no.

I. *Jurek* cannot be reconciled with the requirement defendant seeks to impose.

Jurek v. *Texas*, 428 U. S. 262 (1976), the primary case on the constitutionality of the Texas system, is conspicuous by its absence from the defendant's argument. His brief makes only one passing reference to it. See Petitioner's Brief v, 17. There is a good reason for this curious absence. *Jurek* is flatly contrary to defendant's position.

Jurek, like Johnson, was young at the time of the crime. He was 22. *Jurek*, 428 U. S., at 266. In considering Jurek's case, the Texas Court of Criminal Appeals held that age could be considered in mitigation in the course of answering the second question. *Id*., at 272-273 (quoting *Jurek* v. *State*, 522 S. W. 2d 934, 939-940 (1975)). This Court squarely and unmistakably held that this consideration of Jurek's proffered mitigation met the requirements of the Eighth Amendment. The joint opinion of Justices Stewart, Powell, and Stevens[2] examined the very question at issue today and held that the Texas procedure fulfilled the constitutional requirement in that it "guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender . . . ." *Id*., at 274. Though it is patently obvious that Jurek's mitigating evidence did have relevance beyond the statutory questions, the Constitution did not require further instruction in 1976.

2. For brevity, we will refer to this opinion as the "lead opinion."

Justice White's concurring opinion, joined by Chief Justice Burger and Justice Rehnquist, was even more clearly in favor of validity, denying that there was any requirement to consider mitigation at all. *Id*., at 279 (citing *Roberts* v. *Louisiana*, 428 U. S. 325, 348-350 (1976) (dissent)). Justice Blackmun's statement, by incorporating his *Furman* dissent, similarly affirms that the judiciary has no authority to create a mitigation requirement. 428 U. S., at 279. Thus, not only did *Jurek* expressly uphold the procedure in question on indistinguishable facts, it did so overwhelmingly. Cf. *Payne* v. *Tennessee*, 115 L. Ed. 2d 720, 737-738, 111 S. Ct. 2597, 2610-2611 (1991) (decision by narrow margin).

Penry v. *Lynaugh*, 492 U. S. 302, 315 (1989) says that *Jurek* dealt with "the facial validity of the Texas death penalty statute." Defendant gives this statement its most extreme interpretation. He contends that *Jurek* stands for nothing more than the proposition that the Texas system does not produce an invalid sentence in *every* case. Pet. Brief 17. Both the opinion itself and the normal functioning of the adjudication process contradict this narrow reading.

Neither this Court nor any other federal court has the authority to strike down a statute in the abstract. The power of judicial review exists only as a component of the power and the duty to decide cases. See *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137, 177-178 (1803); *United States* v. *Raines*, 362 U. S. 17, 20-21 (1960). Courts decide cases on the facts presented by the cases, and a wide variety of jurisdictional and prudential doctrines have grown up to prevent the pronouncement of doctrine on abstract questions not actually presented by the dispute before the courts. See generally 1 R. Rotunda & J. Nowak, Treatise on Constitutional Law § 2.13, at 161-242

(2d ed. 1992) (discussing "case or controversy," advisory opinions, mootness, ripeness, finality, and standing).

A "facial challenge" is a departure from the norm, because it does not look to the facts of a concrete dispute. Usually, this departure is made necessary by the procedural posture of the case. When a class action is brought, a facial challenge, if successful, will obtain relief for the entire class without litigating each application. See, *e.g.*, *Schall* v. *Martin*, 467 U. S. 253, 268, n. 18 (1984). An action for declaratory and injunctive relief brought by persons who wish to engage in proscribed activity in the future may be brought as a facial challenge, see, *e.g.*, *Brockett* v. *Spokane Arcades, Inc.*, 472 U. S. 491, 494 (1985), because they do not wish their future freedom of action to be limited to the facts presented in the action. In the First Amendment area, one who seeks to invoke the "overbreadth" doctrine necessarily makes a facial challenge, since the challenger is taking advantage of a special exception to the normal rules of standing, attacking the statute as applied to others, even though it is constitutional as applied to him. See *New York* v. *Ferber*, 458 U. S. 747, 768-769 (1982).

Outside the First Amendment area, criminal defendants appealing their convictions and sentences very rarely limit themselves to facial attacks, for good reason. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that *no* set of circumstances exists under which the Act would be valid." *United States* v. *Salerno*, 481 U. S. 739, 745 (1987) (emphasis added). In *Salerno*, the preventive detention case, the trial court had found that the defendant was the "boss" of a criminal organization which routinely engaged in violence, including murder. *Id.*, at 743-744. It is inconceivable that if preventive detention were permitted at all, it would not be permitted in such a case. Salerno lost nothing by foregoing the "as applied" challenge.

Defendant's reading of *Jurek* implies that Jurek's renowned counsel intentionally threw away the "as applied" challenge even though his client's life literally depended on it. To sustain defendant's position without distinguishing or overruling *Jurek*, it would be necessary to conclude that this Court affirmed Jurek's sentence and condemned him to death because the statute in question *might* be constitutional as applied to *other* defendants even though it contained a glaring constitutional defect *as applied to Jurek*. The *Jurek* Court and counsel should not be accused of perpetrating such a bizarre injustice without exceptionally compelling evidence. In fact, the opinion clearly states the exact opposite.

Jurek had filed a certiorari petition presenting two questions. The first one was "Does the imposition and carrying out of the sentence of death for the crime of murder under the law of Texas violate the Eighth or Fourteenth Amendment to the Constitution of the United States?" The second question dealt with admissibility of a confession. Petition for Writ of Certiorari in *Jurek* v. *Texas*, No. 75-5394, at 2. This Court granted certiorari limited to the first question. 423 U. S. 1082.

The question presented does not unambiguously limit itself to a contention that the statute is unconstitutional in *all* cases, and the *Jurek* lead opinion did not understand the question to be so limited. Nowhere does the opinion use the term "facial challenge." The lead opinion describes in detail the facts of the individual case, which would be irrelevant under defendant's interpretation. *Jurek*, *supra*, 428 U. S., at 264-268. Most importantly, however, the lead opinion very clearly states the question before the Court. "We granted certiorari, 423 U. S. 1082, to consider whether imposition of the death penalty *in this case* violates the Eighth and Fourteenth Amendments . . . ." *Id.*, at 268 (emphasis added). There is similar language in the companion cases. See *Gregg* v.

Georgia, 428 U. S. 153, 162 (1976); *Proffitt* v. *Florida*, 428 U. S. 242, 247 (1976).[3]

Jurek thus holds that the Texas death penalty statute is constitutional as applied to Jurek, and not merely as it might be applied to some future defendant. The very essence of precedent is that a case must be decided the same way as an earlier case with indistinguishable facts, unless that earlier case is overruled. See, *e.g.*, *Pennsylvania* v. *Bruder*, 488 U. S. 9, 11 (1988). Since defendant does not and cannot distinguish *Jurek*, precedent requires affirmance, unless *Jurek* is overruled.

II. *Jurek* has not been overruled to date.

Gregg and its companion cases appeared to resolve two of the most divisive legal issues of modern times: that capital punishment is constitutional and that three of the five sentencing systems considered were constitutional. In light of the magnitude of these issues, one would expect that this Court would consider them as finally resolved and would not reopen them without a justification beyond dispute. See *Planned Parenthood* v. *Casey*, 120 L. Ed. 2d 674, 707, 112 S. Ct. 2791, 2814 (1992). Tragically for the law-abiding people of America, it was not to be.

A. Lockett and Its Progeny.

Along with the Texas system approved in *Jurek*, two other capital sentencing systems were approved the same day. "In *Gregg* v. *Georgia*, we today hold constitutionally valid a capital-sentencing system that directs the jury to consider *any* mitigating factors, and in *Proffitt* v. *Florida*

3. *Gregg* refers to a "limited grant of certiorari" in the context of discussing the vagueness of aggravating circumstances which were *not* found in Gregg's case. 428 U. S., at 201, n. 51; *id.*, at 161. This is entirely different from ignoring a constitutional flaw in the case before the Court. The analogous portion of *Proffitt* pays close attention to the facts of the case. 428 U. S., at 255-256 and nn. 12-13.

we likewise *hold constitutional* a system that directs the judge and advisory jury to consider *certain enumerated* mitigating circumstances." *Jurek* v. *Texas*, 428 U. S. 262, 271-272 (1976) (lead opinion) (emphasis added). Words can hardly be more clear. The Florida system was valid even though the sentencer was not told to consider any circumstances other than those on the list. The *Proffitt* lead opinion made clear that it understood the sentencer was directed to consider only the "seven mitigating factors [listed in the statute] to determine whether the death penalty shall be imposed." *Proffitt* v. *Florida*, 428 U. S. 242, 251 (1976). Two mandatory sentencing systems were struck down. *Roberts* v. *Louisiana*, 428 U. S. 325 (1976); *Woodson* v. *North Carolina*, 428 U. S. 280 (1976).

In *Lockett* v. *Ohio*, 438 U. S. 586 (1978), the Court was faced with an odd hybrid statute. A life sentence could be imposed only if one of three seldom-occurring mitigating circumstances was present: victim induced murder, duress or strong provocation, or psychosis or mental deficiency. *Id.*, at 607. Thus, in the vast majority of cases, a death sentence would be mandatory upon the finding of an aggravating circumstance.

Because this system was mandatory in the vast majority of cases, it could have been struck down under the principles of *Roberts* and *Woodson*. Instead, the *Lockett* plurality chose to reach out and create a sweeping new rule. It held that the sentencer "not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Id.*, at 604 (emphasis in original).

This rule would appear on its face to overrule *Proffitt*'s holding that instruction of the jury on certain enumerated circumstances was proper. However, *Lockett* muddied its own waters by denying it overruled *Proffitt*, noting that the statute in Florida did not specifically tell the sentencer to

ignore nonstatutory factors. *Id.*, at 606, n. 15. The crowning irony of *Lockett* is that this opaque opinion declares, correctly, that "[t]he States now deserve the clearest guidance that the Court can provide." *Id.*, at 602. They did not receive it.

If *Lockett* did not overrule *Proffitt*, as it says it did not, the two can be reconciled only by a narrow construction of *Lockett*'s double negative "not be precluded." These words cannot mean that there is an affirmative requirement to instruct the jury to consider any and all proffered mitigation, unless it overrules *Proffitt*'s validation of the Florida instructions in that case. Perhaps *Lockett* only meant that the sentencer cannot be expressly forbidden to consider nonstatutory mitigation. The next two *Lockett* cases were consistent with this narrow construction. In *Eddings* v. *Oklahoma*, 455 U. S. 104, 109 (1982), the judge believed he was legally precluded from considering important mitigating evidence, and in *Skipper* v. *South Carolina*, 476 U. S. 1, 3 (1986), the judge had excluded the evidence altogether.

Only in *Hitchcock* v. *Dugger*, 481 U. S. 393 (1987) did this Court make clear that it had indeed overruled *Proffitt*. *Hitchcock* quoted disapprovingly the trial judge's description of Florida sentencing law: " '[T]his Court [the trial court] is mandated to apply the facts to *certain enumerated* "aggravating" and "mitigating" circumstances.' 10 Record 195 (emphasis added)." *Id.*, at 398. *Hitchcock* thus emphasized and condemned as constitutional error the trial judge's use of *precisely* the same words which this Court itself had used to describe the Florida system on the day it upheld that system. See *Jurek*, *supra*, 428 U. S., at 272.

B. Penry v. Lynaugh.

Texas, however, still thought that it was safe. The Texas statute never mentioned mitigating circumstances at all; they were only implicit in the statutory questions. *Jurek* had held quite clearly that this was constitutional.

In *Penry* v. *Lynaugh*, 492 U. S. 302 (1989), the majority construed *Jurek* to have upheld the Texas statute "on the basis of assurances that the special issues would be interpreted broadly enough to enable sentencing juries to consider *all* of the relevant mitigating evidence a defendant might present." *Id.*, at 318 (emphasis added). Unlike the Florida situation, this was at least a plausible reading of *Jurek*, which had interpreted the state construction of the statute to include "*whatever* mitigating circumstances [defendant] may be able to show." *Jurek*, *supra*, 428 U. S., at 272 (emphasis added).

In addition to the *Lockett* requirement that the sentencer not be precluded from considering any evidence, there is another, quite different, proposition advanced in *Penry*. That is the notion that even if an item of evidence *is* relevant to the statutory special issue, and even if the sentencer *can* give effect to that item, the sentencing system is nonetheless unconstitutional if the item has additional mitigating force beyond its relevance to the statutory issue. This would seem to be what the majority means by "fully consider." See *Penry*, 492 U. S., at 321. Unfortunately, these two very different propositions are so intertwined in the *Penry* opinion that it is difficult to tell if the holding of the case is based on both or just the first.

If *Penry* were writing on a clean slate, the most plausible reading would be that it both reasserts the *Lockett* "all evidence" rule and creates a new "all possible implications of all evidence" rule. *Penry* itself, however, erects an impenetrable barrier to this interpretation. It emphatically denies that it creates any new rules. See *id.*, at 319.

On its facts, *Penry* fits within the *Lockett* rule. A defendant whose moderate retardation did not prevent him from deliberating and will make him a continuing

danger in the future has a powerful factor in mitigation which cannot honestly justify a negative answer to either of the special issues. See *id.*, at 323. The result that the Texas system may require additional instructions in a few, rare cases can be consistent with a somewhat strained interpretation of *Jurek*.

The more expansive interpretation, however, cannot be reconciled with *Jurek*. The case in which the defendant has *no* mitigating evidence with *any* relevance beyond the special issues will be quite rare. *Franklin* v. *Lynaugh*, 487 U. S. 164, 185 (1988) (O'Connor, J., concurring in the judgment) provides one example, but *Jurek* itself provides the counter-example. Jurek's youth, steady employment, and contribution to his family's welfare, 428 U. S., at 266-267, indisputably had mitigating relevance beyond future dangerousness, yet his sentence was affirmed. As noted earlier, the Court granted certiorari in *Jurek* "to consider whether the imposition of the death penalty *in this case* violates the Eighth and Fourteenth Amendments . . . ," *id.*, at 268 (emphasis added), and decided it did not. That conclusion cannot be reconciled with the expansive interpretation of *Penry*.

C. Parks and Graham.

In addition to *Penry*'s own holding that it did not overrule *Jurek*, we have the further reassertion of *Jurek* in *Saffle* v. *Parks*, 494 U. S. 484 (1990) and *Graham* v. *Collins*, 122 L. Ed. 2d 260, 113 S. Ct. 892 (1993). In *Parks*, the habeas petitioner's contention was that an instruction to the jury not to consider sympathy violates the Eighth Amendment. 494 U. S., at 486. Rejecting the argument that *Lockett* and *Eddings* dictated this result, the Court said "Parks asks us to create a rule relating, not to *what* mitigating evidence the jury must be permitted to consider in making its sentencing decision, but to *how* it must consider the mitigating evidence." *Id.*, at 490 (emphasis in original).

The distinction made by this passage is precisely the distinction between the two threads in the *Penry* opinion. The requirement that the jury be given *some* vehicle to consider Penry's retardation is pure *Lockett*; it relates to *what* evidence must be considered. The contention that the jury must be instructed to consider every mitigating *aspect* of the evidence would be a new rule relating "to *how* it must consider the mitigating evidence." *Parks* goes on to explicitly discuss *Penry* and give it the narrower interpretation. *Parks* notes that Penry's claim was, in part, that the jury was precluded from "giving *any* mitigating effect" to his evidence, *id.*, at 491 (emphasis added), and only that portion of the claim did not require creation of a new rule. "Here, by contrast, there is no contention that the State *altogether prevented* Parks' jury from considering . . . all of the mitigating evidence . . . ." *Ibid.* (emphasis added).

Finally, *Parks* explicitly affirms that *Penry* did not overrule *Jurek*. "The *Penry* Court's conclusion . . . *must be understood in terms of the Court's ruling in Jurek*, and its application in later cases." *Id.*, at 492 (emphasis added). Thus, to the extent that broad language in *Penry* might be construed to overrule *Jurek*, that language was disapproved, and *Jurek* was reaffirmed, in *Parks*.

Graham v. *Collins*, *supra*, follows directly from *Parks*. The narrow reading of *Penry* and the statement that *Penry* did not overrule *Jurek* necessarily lead to the conclusion that a habeas petitioner who does seek to overrule *Jurek* seeks the creation of a new rule.

Graham claimed that his evidence was not given "full mitigating effect" under the Texas special issues, 122 L. Ed. 2d, at 294, 113 S. Ct., at 917 (Souter, J., dissenting), yet his evidence was not a different kind from Jurek's, see *id.*, 122 L. Ed. 2d, at 275, 113 S. Ct., at 902 (majority). To the extent that *Penry* was based on the notion that *Jurek* was limited to the "facial validity" of the Texas statute, see *Penry*, *supra*, 492 U. S., at 315, that

notion is repudiated in *Graham*. *Graham* reads *Jurek* as holding that the Texas system was constitutional as applied to Jurek on the facts of his case, 122 L. Ed. 2d, at 275, 113 S. Ct., at 902, which is indeed what the *Jurek* lead opinion says, see *ante*, at 7.

To recap, then, the present state of the body of precedent is this. *Jurek* held that the Texas system was constitutional on its face and as applied to Jurek. The *Lockett* line of cases holds that the sentencer may not be altogether prevented from considering any item of mitigating evidence. *Penry* holds that additional instruction beyond the Texas special issues may be required in an unusual case, where the defendant has powerful mitigating evidence that cannot be given any consideration under the special issues.

To the extent *Penry* may be read to go beyond *what* the jury considers into *how* the jury considers it, that interpretation is repudiated by *Parks*. To the extent *Penry* may be read as holding that Texas juries must give "full effect" as opposed to "some effect" to mitigating evidence, that interpretation is repudiated by *Graham*. To the extent that *Penry* may be based on the notion that *Jurek* did not consider constitutionality of the statute as applied to the facts of Jurek's case, that notion is repudiated by *Graham*. To the extent that *Penry* may be interpreted to overrule *Jurek*, that interpretation is refuted by *Parks*, *Graham*, and *Penry* itself.

Graham is now precedent that the extension of *Penry* which Graham sought and which Johnson now seeks requires an overruling of *Jurek*. See *Graham*, *supra*, 122 L. Ed. 2d, at 275, 113 S. Ct., at 902 ("wholesale abandonment of *Jurek*"). The sole remaining question is whether *Jurek* should, indeed, be overruled. For the reasons set forth in *Planned Parenthood* v. *Casey*, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (1992), *amicus* submits that *Jurek* should not be overruled.

III. For the reasons stated in *Casey*, *Jurek* should not be overruled.

In *Planned Parenthood* v. *Casey*, 120 L. Ed. 2d 674, 704, 112 S. Ct. 2791, 2812 (1992), this Court identified four factors governing the decision to overrule a precedent in "normal *stare decisis* analysis" and additional considerations which apply to "national controversies." *Amicus* submits that both types of considerations apply to *Jurek* and that all applicable factors weigh against its overruling.

A. Normal Stare Decisis Analysis.

In deciding whether to overrule a precedent, this Court

> "may ask whether the rule has proved to be intolerable simply in defying practical workability [citation]; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation [citation]; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine [citation]; or whether facts have so changed or come to be seen so differently, as to have robbed the old rule of significant application or justification [citation]." *Id.*, 120 L. Ed. 2d, at 700, 112 S. Ct., at 2808-2809.

1. Workability.

There is nothing unworkable about the *Jurek* rule. That case approved the practice of instructing juries in the terms of the statute. The *Penry* exception to *Jurek* does introduce some additional complication, since it requires a case by case analysis of the mitigating evidence to determine whether the evidence in a given case could not be given any effect. This difficulty is no greater than the difficulty of the rule Johnson proposes, which would require case by case analysis of the type in Justice

O'Connor's opinion in *Franklin* v. *Lynaugh*, 487 U. S. 164, 185-187 (1988). If practical workability were the driving force for overruling, it would point toward overruling *Penry*, not *Jurek*.

2. Reliance.

The reliance interest in this case is monumental. Enforcement of the criminal law is the single most important function of state government. See *Illinois* v. *Gates*, 462 U. S. 213, 237 (1983). Capital cases are, by their nature, the most important cases in that function. The state must devote enormous resources, both to investigate and litigate its own case and to provide counsel and experts for the defendant. See *Powell* v. *Alabama*, 287 U. S. 45 (1932); *Ake* v. *Oklahoma*, 470 U. S. 68 (1985). In 1989, when *Penry* was decided, there were around 300 prisoners under sentence of death in Texas, U. S. Bureau of Justice Statistics, Capital Punishment 1989, at 6 (1990), all of them tried and sentenced in reliance on this Court's holding in *Jurek* that the Texas system was constitutional.

Payne v. *Tennessee*, 115 L. Ed. 2d 720, 737, 111 S. Ct. 2597, 2610 (1991) noted that reliance interests are generally at a minimum in cases of procedure and evidence. That is true for rules favoring the defendant. Virtually no one decides to commit a crime based on existing rules of procedure, and any such reliance would not be legitimate.[4] Furthermore, because the prosecution cannot appeal an acquittal, a defendant who successfully invokes an existing rule at trial has nothing to fear from a later reversal of that rule.

For the prosecution, the situation is quite different. Defendants *can* appeal, and if an old rule is overturned,

4. A person may well rely on an existing rule of *substantive* law that his conduct is legal. Such reliance is fully protected by the Due Process Clause. See *Marks* v. *United States*, 430 U. S. 188, 191-192 (1977).

every pending appeal is decided under the new rule. *Griffith* v. *Kentucky*, 479 U. S. 314, 328 (1987). Because of their complexity, capital appeals may not become final for many years after trial. The present case was tried over six years ago. Pet. Brief 3. Since "virtually *any* mitigating evidence is capable of being viewed as having some bearing on the defendant's 'moral culpability' apart from its relevance to the particular concerns embodied in the Texas special issues," *Graham* v. *Collins*, 122 L. Ed. 2d 260, 275, 113 S. Ct. 892, 902 (1993) (emphasis in original), accepting Johnson's new rule would require retrial of many years of cases. Such a massive expenditure of scarce judicial resources would require an exceptionally compelling justification.

3. Development of the law.

The day after *Penry* was decided, the argument could have been made that *Jurek* was nothing but an empty shell. See *Penry* v. *Lynaugh*, 492 U. S. 302, 354-355 (1989) (Scalia, J., dissenting). If subsequent cases had read *Penry* as Justice Scalia's dissent read it, then it could be said that *Jurek* was "no more than a remnant of abandoned doctrine." *Casey*, *supra*, 120 L. Ed. 2d, at 700, 112 S. Ct., at 2808.

However, as discussed in part II-C, *ante*, 12-14, *Parks* and *Graham* have limited *Penry* and reaffirmed *Jurek*. If any case in the line is a "remnant of abandoned doctrine," it is *Penry*, not *Jurek*.

4. Changed facts.

Defendant makes something of a "changed facts" argument in his discussion of *Hitchcock* v. *Dugger*, 481 U. S. 393 (1987). He reads *Hitchcock* as being the product of "experience" with the Florida system approved in *Proffitt* and the result of observing that system "in practice." Pet. Brief 14-15 and n. 7. Defendant reads *Hitchcock* as a factual discovery that some Florida

sentencers were not considering some mitigating circumstances, thereby justifying a departure from *Proffitt*. An analogous argument would be that experience in Texas indicates that some mitigating evidence, although relevant to the second special issue, cannot be "fully considered" under that issue.

The fallacy here is that experience has not shown anything that was not obvious at the time of the earlier decisions. The Court was well aware in 1976 that the Florida system limited mitigation to "certain enumerated mitigating circumstances." *Jurek* v. *Texas*, 428 U. S. 262, 272 (1976). Similarly, it was well aware that the Texas system permitted consideration of Jurek's youth and other mitigating evidence *only* to the extent that they bore on future dangerousness. *Ibid*.

Neither *Proffitt* nor *Jurek* was based on a factual belief that the system under consideration permitted the sentencer to consider *every* mitigating aspect of *every* mitigating fact the defendant might proffer. No rational person could believe either system did on the record before the Court in the actual cases. Both cases upheld the systems involved because there was no constitutional requirement for unlimited consideration of mitigation. The fact that neither system allows such unlimited consideration is not a "changed fact"; it is a fact that was known from the very beginning.

The "factual underpinnings" of *Jurek* have not changed. Consequently, "the court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of [1976]." *Casey*, *supra*, 120 L. Ed. 2d, at 706, 112 S. Ct., at 2813-2814.

B. National Controversies.

Capital punishment, like abortion, economic legislation, and segregation, is an issue of intense national debate. Every presidential candidate declares his position

on the issue, and those who publicly oppose it are invariably defeated. Support for the death penalty now runs over four to one in favor. U. S. Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics—1991, at 211 (1992).[5] Special caution is needed in areas of such magnitude.

1. Public confidence.

"There is, first, a point beyond which frequent overruling would overtax the country's belief in the Court's good faith." *Casey*, *supra*, 120 L. Ed. 2d, at 708, 112 S. Ct., at 2815. In the case of capital punishment, that point has already been reached, not with outright, honest overrulings but instead with effective overrulings based on flimsy or nonexistent distinctions.

In *McGautha* v. *California*, 402 U. S. 183 (1971), the question of the constitutionality of unbridled sentencing discretion was squarely before the Court. The ruling was clear and unequivocal. "[W]e find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to *anything* in the Constitution." *Id*., at 207 (emphasis added). Yet only one year later, the precise argument so clearly rejected in *McGautha* was accepted in *Furman* v. *Georgia*, 408 U. S. 238 (1972), through the disingenuous device of engrafting procedural requirements onto the previously purely substantive Cruel and Unusual Punishment Clause. As discussed in part II-A, *ante*, 8-10, this Court did a second about-face in the *Lockett* line of cases, striking down the system it had expressly approved in *Proffitt*. See *Lockett* v. *Ohio*, 438 U. S. 586, 622 (1978) (White, J., dissenting in part) ("about-face"); *id*., at 629 (Rehnquist, J., dissenting) ("pillar to post"); *Walton* v. *Arizona*, 497 U. S. 639, 667-

5. This figure actually understates the support. Survey respondents are asked about the penalty for murder generally, not the smaller subclass of the worst murderers actually eligible for the penalty. *Ibid*.

668 (1990) (Scalia, J., concurring in part). Two disapprovals of expressly approved systems are quite enough.

The entire edifice of "procedurally cruel and unusual punishment" is built on the shakiest of foundations. If the public is to accept these limitations as genuine, this Court's precedents must mean something. Approval of a state's sentencing system cannot have such a limited meaning that the vast majority of defendants can successfully attack the statute as applied to their cases. Even the "facial" challenge, which defendant claims *Jurek* was, should have been successful if the system were unconstitutional in the vast majority of its intended applications, cf. *United States* v. *Raines*, 362 U. S. 17, 23 (1960), for if it were the remaining few sentences would be "a capriciously selected random handful," see *Furman*, *supra*, 408 U. S., at 309-310 (Stewart, J., concurring).

Constitutionality of the system, at a rock bottom minimum, must mean that the system approved is free of the kind of systemic flaws that would invalidate the majority of sentences rendered under it. If not, then instead of being a watershed decision, *Jurek* was a pointless exercise in futility. The country deserves better.

2. *Promise of constancy.*

Casey also recognizes this Court's implied promise of constancy to those who must implement its decisions. Zigzag jurisprudence makes dedicated, conscientious judges and lawyers look like buffoons. Prosecutors make arguments and request instructions in reliance on this Court's approval of procedures. Competent defense lawyers may decline to object or to appeal the issue, concentrating their efforts on arguments likely to succeed. See *Smith* v. *Murray*, 477 U. S. 527, 536 (1986). If the defense does object, the trial court overrules the objection in reliance on precedent. When the precedent is later overruled or distinguished out of existence, the prosecutor is accused of misconduct, the defense lawyer is accused of

incompetence, and the trial judge is accused of disregarding the defendant's constitutional rights. See, *e.g.*, *ante*, at 10 (*Hitchcock*).

Legislatures, also, rely on this Court's precedents. In 1991, in reaction to *Penry*, the Texas Legislature acted to remove the remaining guidance and give the jury what amounts to unfettered, pre-*Furman* discretion in every case of "capital murder." See 3A Tex. Code Crim. Proc. Ann., Art. 37.071(2)(e) (Vernon Supp. 1993). If such additional instructions were constitutionally required, this Court could have and should have said so in 1976. The Legislature could then have amended the statute 15 years earlier. When this Court affirmed Jurek's sentence in a case where no such instruction had been given, it implicitly promised the people of Texas that no such instruction was constitutionally required.

> "The promise of constancy, once given, binds its maker for as long as the power to stand by the decision survives and the understanding of the issue has not changed so fundamentally as to render the commitment obsolete. From the obligation of this promise this Court cannot and should not assume any exemption when duty requires it to decide a case in conformance with the Constitution. A willing breach of it would be *nothing less than a breach of faith*, and no Court that broke its faith with the people would sensibly expect credit for principle in the decision by which it did that." *Casey*, 120 L. Ed. 2d, at 709, 112 S. Ct., at 2815-2816 (emphasis added).

Let there be no mistake. Johnson is asking this Court for a massive breach of faith with the people of Texas. He is asking this Court to hold that *Jurek*'s approval of the Texas system only applies to rare cases, and that the system previously upheld is now unconstitutional in the vast majority of cases. See Pet. Brief 17. Such a mockery of precedent is contrary to all of the reasons for *stare decisis*.

Some Members of this Court may very well believe that *Jurek* was wrongly decided as an initial matter. The facts remain, however, that *Jurek* was decided in favor of validity and that the people of Texas relied upon it. Disagreement with the initial decision is not a sufficient basis for overruling a precedent of this importance. *Casey*, 120 L. Ed. 2d, at 706, 112 S. Ct., at 2814. If this Court meant what it said in *Casey*, the essential holding of *Jurek* must be upheld.

IV. *Penry* should remain limited to its narrow interpretation.

As the preceding discussion indicates, many of the reasons for not overruling *Jurek* v. *Texas*, 428 U. S. 262 (1976) would support overruling *Penry* v. *Lynaugh*, 492 U. S. 302 (1989). It has already been reduced by subsequent cases, and there are questions about its practical application. Nonetheless, the contrary interests in stability also count, and the damage for future Texas cases has already been done. See *Graham* v. *Collins*, 122 L. Ed. 2d 260, 288, n. 9, 113 S. Ct. 892, 913, n. 9 (1993) (Thomas, J., concurring).

Amicus therefore submits that the best way out of this difficult situation is to declare a cease-fire in place between *Penry*, as narrowly interpreted in *Graham* and *Parks*, on the one hand, and the unmistakable holding of *Jurek* itself, on the other. That is, in a case where the defendant presented compelling mitigating evidence which would universally be considered to substantially reduce his culpability, but which offered the jurors *no* basis for answering either of the special issues "no," that defendant is entitled to a new sentencing hearing. In cases such as *Jurek* and *Graham*, where the evidence could be considered in returning a "no" answer, no additional instruction is constitutionally required.

Application of this rule to the present case is straightforward. This case is indistinguishable from *Jurek*.

CONCLUSION

The judgment of the Texas Court of Criminal Appeals should be affirmed.

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Respectfully submitted,

KENT S. SCHEIDEGGER

Attorney for Amicus Curiae
Criminal Justice Legal Foundation